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HO SENG KUNG & ANOR

v.

LAI CHOOI

B

COURT OF APPEAL, PUTRAJAYA
ZALEHA ZAHARI JCA
KN SEGARA JCA
KANG HWEE GEE JCA
[CIVIL APPEAL NO: B-02-1045-06]

C

12 JUNE 2009

CIVIL PROCEDURE: *Writ of summons - Extension of - Exercise of court's discretionary power to extend a writ - Effect of service of an expired writ - Whether a non-compliance that should not be condoned -*

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Rules of the High Court 1980, O. 6 r. 7

CIVIL PROCEDURE: *Time - Extension of time - Writ of summons - Exercise of court's discretionary power to extend a writ - Effect of service of an expired writ - Whether a non-compliance that should not be condoned - Rules of the High Court 1980, O. 6 r. 7*

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This was an appeal by the 1st and 2nd defendants against the dismissal, by the High Court judge, of their appeal against the decision of the senior assistant registrar granting the plaintiff's application for extension of a writ. The present appeal was

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concerned with the exercise of the court's discretionary power to extend a writ, and if the court were to hold a writ has not been validly extended, the effect of service of such an expired writ.

Held (allowing the appeal with costs)

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Per Zaleha Zahari JCA delivering the judgment of the court:

(1) On the facts of this case, the plaintiff did not take advantage of an order dated 30 January 1999 obtained by him to serve the writ on the 1st and 2nd defendant by way of substituted

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service. The plaintiff did not file the application for extension of time within the time prescribed by the amended O. 6 r. 7 of the Rules of the High Court 1980, and appeared to have attempted to obtain an extension order far beyond that which a court was empowered to make. Then, after being informed

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where service on the 1st and 2nd defendants could be effected, he did so only five months later. The service of a writ which had long expired, clearly far beyond the prescribed

period which the court is empowered to extend, was not a mere irregularity that was curable, but a non-compliance that should not be condoned. The High Court judge was thus in error in dismissing the 1st and 2nd defendant's appeal and in affirming the decision of the senior assistant registrar. (paras 18 & 19)

[Order accordingly.]

Bahasa Malaysia *Translation Of Headnotes*

Ini adalah rayuan oleh defendan-defendan pertama dan kedua terhadap penolakan, oleh hakim Mahkamah Tinggi, rayuan mereka terhadap keputusan penolong pendaftar kanan membenarkan permohonan plaintif untuk perlanjutan sesuatu writ. Rayuan semasa berhubungan dengan pelaksanaan kuasa budi bicara mahkamah untuk melanjutkan suatu writ, dan jika mahkamah berpendapat suatu writ tidak dilanjutkan dengan sah, akibatnya penyampaian sesuatu writ yang sudah tamat tempohnya.

Diputuskan (membenarkan rayuan dengan kos)
Oleh Zaleha Zahari HMR menyampaikan penghakiman mahkamah:

(1) Berdasarkan fakta-fakta kes ini, plaintif tidak mengambil kesempatan suatu perintah bertarikh 30 Januari 1999 yang diperolehi olehnya untuk menyampaikan writ itu ke atas defendan-defendan pertama dan kedua melalui penyampaian ganti. Plaintif tidak memfail permohonan untuk perlanjutan masa dalam masa yang diperuntukkan oleh A. 6 k. 7 yang dipinda Kaedah-kaedah Mahkamah Tinggi 1980, dan nampaknya mencuba untuk memperolehi sesuatu perintah perlanjutan yang jauh melebihi satu perintah yang mahkamah diberi kuasa untuk membuat. Kemudiannya, selepas diberitahu di mana penyampaian ke atas defendan-defendan pertama boleh dibuat, beliau berbuat sedemikian hanya selepas lima bulan. Penyampaian suatu writ yang telah lama tamat tempohnya, dengan jelas jauh melebihi tempoh yang diperuntukkan bagi mahkamah diberi kuasa melanjutkan, bukan hanya suatu luar aturan yang boleh dibetulkan, tetapi suatu ketidakpatuhan yang tidak boleh dimaafkan. Hakim Mahkamah Tinggi, oleh itu, telah khilaf dalam menolak rayuan defendan-defendan pertama dan kedua dan dalam mengesahkan keputusan penolong pendaftar kanan.

[Diperintah sedemikian.]

Legislation referred to:
Rules of the High Court 1980, O. 6 r. 7(1), (2A), (3)

For the appellant - Mr Selvaraj; M/s Raj & Co
For the respondent - KH Chong; M/s Huang Khairun Kumar & Assoc

[Appeal from High Court, Shah Alam; Civil Suit No: MT4-22-979-1998]

Reported by Suresh Nathan

JUDGMENT

Zaleha Zahari JCA:

[1] This appeal is concerned with the exercise of the court's discretionary power to extend a writ; and if the court were to hold a writ has not been validly extended, what is the effect of service of such an expired writ?

[2] What happened on the facts of this case was this. The plaintiff (respondent in this appeal) had, on 1 August 1998, filed a writ of summons and statement of claim against the 1st and 2nd defendant (appellant in this appeal) and two others. Pursuant to O. 6 r. 7(1) of the Rules of the High Court 1980 ("the Rules") as it then stood, the writ was accordingly valid for a period of twelve months from date of its issuance (ie, up to 31 July 1999, "the original period").

[3] During the validity of the original period of the writ, on 30 January 1999, the plaintiff applied for an order to serve the writ and statement of claim on the 1st and 2nd defendant by way of substituted service which was granted by the court. Be that as it may, when the original period of writ expired on 31 July 1999, service on the 1st and 2nd defendant by way of the order of the substituted service obtained, had yet to be effected. As to why no action was taken to serve the writ by way of substituted service is unclear.

[4] Action to extend the validity of the writ was taken five months after the original period had expired. On 28 December 1999, the plaintiff filed an *ex parte* application for extension of the writ. An order in terms of the application was granted by the senior assistant registrar (SAR) on 28 March 2000. The validity of the writ was extended for a period of 12 months commencing

from 1 August 1999 to 31 July 2000 (first extended period). It is common ground that the writ was unserved on the 1st and 2nd defendant when the first extended period expired. As why the plaintiff did not do so is also unclear.

[5] We are of the view that as far as the first extension of the writ is concerned, the period of five months after it initially expired, was an irregularity which was curable, and in fact cured, by the court order dated 28 March 2000 which extended the writ from 1 August 1999 for a period of 12 months to 31 July 2000.

[6] The rules in respect of an application to extend a writ was amended by PU (A) 342/2000 with effect from 21 September 2000. For convenience of reference the provisions of O. 6 r. 7 prior to, and subsequent to, its amendment, are reproduced.

(a) Pre Amendment

(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for twelve months, beginning with the date of its issue ...

(2) Where a writ has not been served on a defendant, the Court may by order extend the validity of the writ from time to time for such period, not exceeding 12 months at any one time, beginning with the day next following that, on which it would otherwise expire, as may be specified in the order, if an application for extension is made to the Court before that day or such later day (if any) as the Court may allow.

(3) Before a writ, the validity of which has been extended under this rule, is served, it must be marked with an official stamp in Form 5 showing the period for which the validity of the writ has been extended.

(b) Post Amendment

(1) For the purpose of service, a writ (other than a concurrent writ) is valid in the first instance for six months, beginning with the date of its issue ...

(2) Subject to paragraph (2A) where efforts to serve a writ on a defendant has been unsuccessful, the Court may by order extend the validity of the writ twice (in Sabah and Sarawak thrice and in admiralty actions 5 times), not exceeding 6 months at any one time, beginning with the day next following that on which it would otherwise expire, as may be specified in the order.

A (2A) An application for renewal must be made before the expiry of the writ, *ex parte* by summons, supported by affidavit showing that efforts have been made to serve the defendants within one month of the date of the issue of the writ and that efforts have been made subsequent thereto to effect service.

B (3) Before a writ, the validity of which has been extended under this rule, is served, it must be marked with an official stamp in Form 5 showing the period for which the validity of the writ has been extended.

C **[7]** Thus, with effect from 21 September 2000, a writ could no longer be extended for a period of 12 months in one application but for a shortened period of only six months. The amended rule also limits the number of times it may be renewed, only twice, also for a shortened period of six months at any one time. This was a D clear departure from the pre-amended provisions, where the court was empowered to extend a writ for a period 12 months at any one time, and the number of times a writ may be extended, was not limited.

E **[8]** The requirement that the extended period was to begin with the day next following that on which it would otherwise expire pursuant to O. 6 r. 7(3) was unchanged. The new para (2A) makes it obligatory for an application for renewal of a writ to be filed before the date of its expiration. This is to be contrasted with F the pre-amended position where it was permissible for such an application to be filed not necessarily before the date of expiration but could be made on "such later day (if any) as the court may allow".

G **[9]** Reverting back to the chronology of events, no action was taken by the plaintiff during the period of 21 months after the first extended period of 31 July 2000 lapsed. The plaintiff took the next step only on 1 April 2002, by filing another *ex parte* application for extension of the writ, "for a period of six months H from the date of the application".

[10] The new para 2A of O. 6 r. 7 clearly had not been complied with by reason of the application being filed 21 months from the date the 1st extension period had expired. An application for the I extended period to commence from "the date of application" and

not "beginning with the day next following that on which it would otherwise expire" was clearly not in compliance with the pre, nor the post, amended provision of O. 6 r. 7. The application applied for, on the facts of this case, would mean the period of 21 months after the 1st extended date expired (31 July 2000) to the date the 2nd application for extension was filed (1 April 2002) would for not be covered by any extension order!

[11] We however observe that from the sealed order dated 14 June 2002 extracted by the plaintiff in respect of the second application for extension was not as prayed for by the plaintiff. The extension granted was only for a period as prescribed in the amended O. 6 r. 7(1). The order states:

> ADALAH DIPERINTAHKAN bahawa Plaintiff dibenarkan untuk melanjutkan Writ Saman dan Pernyataan Tuntutan bertarikh 1 haribulan Ogos 1998 yang **luput pada Julai 1999 dilanjutkan selama 6 bulan daripada tarikh luputnya** dan kos permohonan ini dijadikan kos dalam kausa. (emphasis added)

[12] In other words, the writ was only extended for a period of six months from the 1st extension date (1 August 1999), and to expire six months thereafter (ie, 1 January 2000).

[13] The official stamp in Form 5 on the writ pursuant to O. 6 r. 7(3) was purportedly based on an order dated 14 June 2002. The period for which the validity of the writ has been extended pursuant to court order dated 14 June 2002 according to the official stamp was:

> Writ Saman dilanjutkan untuk tempuh masa 6 bulan bermula dari 1-4-2002 sehingga 30-9-2002 melaului perintah 14-6-2002.

The respondent's counsel argued that effect must be given to this official stamp, that the writ had been extended to 30 September 2002.

[14] Based on the record before us it is clear that plaintiff had not applied for, and therefore did not obtain, and accordingly did not produce, a court order of an extension of the writ for the period 1 April 2002 to 30 September 2002. The order dated 14 June 2002 was but for an extension of the writ for a period six months from date the 1st extended date expired, ie, only until

A January 2000. We are of the view the foundation of an official stamp on the writ denoting that it had been extended must necessarily be a valid court order to that effect. In the absence of such a court order, such a stamping was clearly not a valid official stamp.

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[15] Pausing here for a moment, the position therefore as at 7 February 2002, (when Tetuan Raj & Co informed the plaintiff's solicitors that they were prepared to accept service of the writ on behalf of the 1st and 2nd defendant *vide* their letter dated C 7 February 2002), was, that the validity of the writ had only been extended to January 2000, and not, June 2002.

[16] The record also shows that although Tetuan Raj & Co informed the plaintiff's solicitors that they were prepared to accept service of the writ on behalf of the 1st and 2nd defendants on D 7 February 2002, service was only effected on Tetuan Raj & Co some five months later on 1 August 2002. What was served on Tetuan Raj & Co was clearly a writ which on the facts of this case had expired on January 2000.

E **[17]** It was further argued by the respondent's counsel that the irregularity of the writ not having been validly extended had been waived by the filing of an Unconditional Memorandum of Appearance by Tetuan Raj & Co on 7 August 2002 on behalf of the 1st and 2nd defendants and that it was incumbent upon F Tetuan Raj & Co. to observe the respective dates specified in the writ. Bearing in mind applications of extension of writs are made *ex parte*, and the existence of an official stamp on the writ unsupported by a court order, the 1st and 2nd defendant are not estopped from filing an application to set aside service of the writ G which had been effected notwithstanding the fact that an unconditional appearance had been filed on their behalf. On this issue we note the 1st and 2nd defendant had in their statement of defence expressly stated (para 1) that it was without prejudice to their right to file an application to set aside, which application H was filed on 11 February 2003 (encl. (21)) the decision of which is the subject matter of this appeal.

[18] We are of the considered opinion that effect must be given to the intention of the Rules Committee by the amended O. 6 I r. 7. A party is required, upon commencement of any proceedings, to prosecute the action diligently and expeditiously within the time

frame prescribed by the amended Rules. On the facts of this case the plaintiff did not take advantage of the order dated 30 January 1999 obtained by him to serve the writ on the 1st and 2nd defendant by way of substituted service. The plaintiff did not file the application for extension of time within the time prescribed by the Rules and appeared to have attempted to obtain an extension order far beyond that which a court was empowered to make. Then, after being informed where service on the 1st and 2nd defendant could be effected, did so only five months later. In our view the service of a writ which had long expired, clearly far beyond the prescribed period which the court is empowered to extend, was not a mere irregularity which was curable, but a non compliance which should not be condoned.

[19] We find that the learned judge was in error in dismissing the 1st and 2nd defendant's appeal and in affirming the decision of the SAR. For the reasons enumerated above the appeal is allowed with costs. The decision of the High Court Judge is set aside. In view of our views on the order dated 14 June 2002 as stated earlier on in this judgment, there will be no order as to prayers (a) and (b) of encl. (21). In respect prayer (c), service of the expired writ on the 1st and 2nd defendant's solicitors, Tetuan Raj & Co, is accordingly set aside.